

FEDERAL COMMUNICATIONS COMMISSION

FCC 98-311

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of) MM Docket No. 94-10
)
The Lutheran Church/) File Nos. BR-890929VC
Missouri Synod) BRH-890929VB
)
)
For Renewal of Licenses of)
Stations KFUE/KFUE-FM)
Clayton, Missouri)

ORDER

Adopted: November 19, 1998 ; Released: November 24, 1998

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

1. In a Memorandum Opinion and Order in this proceeding, the Commission renewed the licenses of The Lutheran Church/Missouri Synod ("Church") for Stations KFUE(AM) and KFUE-FM subject to reporting conditions as a consequence of the Church's violation of provisions of the Commission's equal employment opportunity ("EEO") rule, 47 C.F.R. §73.2080. The Lutheran Church/Missouri Synod, 12 FCC Rcd 2152 (1997). Section 73.2080 requires a broadcast licensee to refrain from employment discrimination on the basis of race, color, religion, national origin, or gender, and to establish, maintain, and carry out an EEO program reflecting positive and continuing efforts to ensure equal opportunity in every aspect of station employment.¹ The Commission found no evidence of intentional discrimination on the basis of race but determined that the Church improperly gave preferential hiring treatment on the basis of religion to persons with knowledge of Lutheran doctrine and made insufficient efforts to recruit minorities. 12 FCC Rcd at 2165-66.

2. On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit held that the Commission's employment program requirements are unconstitutional because they violate the equal protection clause of the Fifth Amendment and therefore cannot serve as a basis for the decision in this case. The panel stated, however, that it was not reaching the non-discrimination aspect of the rule, and therefore remanded the case to the Commission "so it can determine whether it has authority to promulgate an employment non-discrimination

¹But see the discussion in ¶ 2, below.

rule" in light of the court's holding. Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998). Thereafter, the Commission filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which the court denied. Lutheran Church - Missouri Synod v. FCC, No. 97-1116 (D.C. Cir. Sept. 15, 1998).² The mandate issued on September 23, 1998.

3. In view of these judicial rulings, we now grant the Church renewal of its broadcast licenses without EEO reporting conditions and terminate this proceeding, subject to the outcome of any subsequent judicial review of the court's decision. This Order allows the Church to use religious belief or affiliation as a job qualification for all station jobs and moots any issue as to the Commission's authority in this proceeding to consider whether the Church has discriminated in hiring on the basis of religion. In a recent Order and Policy Statement, Streamlining Broadcast EEO Rule and Policies, 13 FCC Rcd 6322, 6323 (1998), issued prior to the panel's decision in this case, the Commission decided "to permit religious broadcasters to establish religious belief or affiliation as a job qualification for all station employees." This action, which was designed to eliminate the potential danger of impermissible governmental interference with a religious broadcaster's judgment in the conduct and definition of its religious affairs, is "binding for radio licensees and permittees," such as the Church. Id. Following this action, we informed the court, in a Motion for Partial Remand of Record at 1 (March 5, 1998), that, on remand, we would adopt an order granting the Church's applications for renewal of its two licenses without EEO reporting conditions. Although the Motion was denied, nothing in the court's denial affects the previously announced commitment of the Commission, upon the return to the Commission of jurisdiction, to allow the Church to use religious belief or affiliation as a job qualification for all station jobs and to avoid any attempt to sanction the Church for any past discrimination in employment on the basis of religion. Today's Order, in keeping with our binding EEO order and commitment to the court, grants the Church renewal of its licenses without EEO reporting conditions.³

4. In light of our action, the issue remanded by the court with respect to our jurisdiction

²We did not seek rehearing of that portion of the panel's opinion that vacated a Commission finding of lack of candor and imposition of a \$25,000 forfeiture.

³Our ruling granting the Church an unconditional renewal of its licenses moots a Motion to Vacate or Delete Reporting Conditions filed December 23, 1997 by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP. In addition, the Church's Motion for Stay of EEO Reporting Requirement filed September 19, 1997 was mooted by Order (D.C. Cir. November 13, 1997), in which the court granted the Church's motion for a stay, and provided relief identical to that sought in the Motion filed with the Commission.

to enforce an anti-discrimination rule is moot in the context of this case.⁴ It is being addressed in a rulemaking proceeding just commenced.⁵

5. ACCORDINGLY, IT IS ORDERED, That the applications of The Lutheran Church/Missouri Synod for renewal of license of Stations KFUE(AM) and KFUE-FM ARE GRANTED, that the Motion for Stay of EEO Reporting Requirement filed September 19, 1997 by The Lutheran Church/Missouri Synod and the Motion to Vacate or Delete Reporting Conditions filed December 23, 1997 by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP ARE DISMISSED, and that this proceeding IS TERMINATED, subject to the outcome of any subsequent judicial review of the court's decision.

6. IT IS FURTHER ORDERED, That those portions of the Commission's Memorandum Opinion and Order, 12 FCC Rcd 2152 (1997), and the underlying decisions of the Administrative Law Judge, 10 FCC Rcd 9880 (ALJ 1995), and the Review Board, 11 FCC Rcd 5275 (Rev. Bd. 1996), not previously vacated by the court, ARE VACATED, subject to the outcome of any subsequent judicial review of the court's decision.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁴We do not understand the Church to be arguing that it should be permitted to discriminate among Lutherans on the basis of race.

⁵Notice of Proposed Rule-Making, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, FCC 98-305, adopted November 19, 1998.

Concurring Statement of Commissioner Harold Furchtgott-Roth**In re Applications of Lutheran Church/Missouri Synod, For Renewal of Licenses of Stations KFUE/KFUE-FM, MM Docket No. 94-10**

I concur in the decision of this Order ("MO&O") to vacate the Commission's previous finding of religious discrimination against the Missouri Synod of the Lutheran Church. I write to make clear that I do not do so on the basis of any "commitment," *supra* at para. 3, to the D.C. Circuit.

As I asked our General Counsel to communicate to the Court of Appeals during the pendency of the *Lutheran Church* litigation, I believe that it is inappropriate for the Commission to commit to reaching particular results on the merits of any adjudication before the proceeding is actually before us. *See Lutheran Church-Missouri Synod*, 141 F.3d 344, 349 (D.C. Cir. 1998); 154 F.3d 487, 489 n. 1. Such precommitment, prior to review of the facts of the case and application of the relevant policies, whatever the potential result of judicial review, raises questions of fairness to the parties, of the impartiality of the decisionmakers, and thus potentially of propriety under the Administrative Procedure Act.

Now that the finding of inadequate recruitment efforts has been eliminated from the case, only the finding of discrimination on the basis of religion remains. I believe that the position we took in the *Order and Policy Statement, Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998), was correct: in light of free exercise concerns, religious broadcasters should be permitted to select all employees based on religious affiliation. For that reason, I vacate this finding.